HEARSAY EVIDENCE IN MATTERS OF PUBLIC OR GENERAL INTEREST. — For many years it has been the custom of English courts to allow hearsay evidence on a matter of public or general interest. Questions as to political boundaries, or public prescription, matters of public concern affecting the entire nation, may be established by hearsay evidence. And even a matter of general interest, which affects the whole or part of a single community, such as manor boundaries or rights of common, are treated in the same way. But the English courts do not extend the exception to the hearsay rule so far as to allow private affairs to be thus established. It is true that the subject of prescription in general, whether public or private, was until the end of the last century supposed to be susceptible of proof by reputation. But *Dunraven* v. *Llewellyn*, 15 Q. B. 1811, declared in 1850 that it was the settled rule that private prescriptions could not be shown in this way. The American law in many of the States goes further in allowing private boundaries to be defined by reputation. *Morton* v. *Folger*, 15 Cal. 275 (Supt. Ct.). The intricate skein of individual rights in our early settlements of land could rarely be disentangled except by such a medium of proof. And this doctrine may be traceable to the older English rule as regards private prescription.

The method of proof in a matter of public or general concern formerly consisted in showing what was its reputation in the community *ante litem motam* and this reputation had to be traditionary, not that which was merely current at the time. Formerly when the jurors had a right to go upon their own knowledge, they were expected in a question of antiquity to rely on what had been handed down to them from their fathers. And the application of the older methods is but natural when the jurors are listening to the testimony of a witness as to what he himself heard. Thayer, Cases on Evidence, p. 420, note 1. To-day, however, under the guise of reputation, it is stated that the specific declarations of a deceased person are admissible to establish a matter of public or general interest.

The question whether hearsay evidence was admissible in a matter which concerned a number of persons has recently been presented to the Court of Appeal in England in *Evans* v. *The Urban District Council of Merthyr*, 79 L. T. Rep. 578. On the issue whether a certain bit of land was common land or subject to any commonable rights, either of the commoners of the parish of Cantreff or of the commoners of the parish of Llanfrynach, it was held that evidence of reputation was admissible. It must be taken that the reputation was such as was traditional in the community. Therefore the decision is clearly correct. Disputes as to manor boundaries and manor rights arising frequently in England, such an exception to the rule against hearsay is of much practical value. And the extended rule in America is well suited to a country where vast tracts of land are rapidly being settled.

RECENT CASES.

AGENCY — UNAUTHORIZED CONTRACT — LIABILITY OF PRINCIPAL. — The plaintiff as agent for the defendant, without disclosing the existence of his principal, entered into an unauthorized contract for the sale of fruit, which the defendant later approved, but failed to carry out. The plaintiff being compelled to perform his agreement, *held*, that he was entitled to recover his commission, but not his expenses in fulfilling the contract. *Delafield* v. *Smith*, 78 N. W. Rep. 170 (Wis.).

The conclusions of the court appear quite inconsistent. Generally where a principal with full knowledge of the circumstances ratifies an unauthorized act of his agent he is bound thereby as fully as if he had originally authorized the act. *McLean* v. *Dunn*, 4 Bing. 722. If the ratification is made in ignorance of some material circumstance he may on learning all the facts disaffirm the act. *Combs* v. *Scott*, 94 Mass. 493. If the defendant in the principal case had a right to disaffirm the contract after the ratification, which does not clearly appear, he should not have been held liable to the plaintiff even for the commission. If the ratification was binding upon him he should have been held liable for both commission and expenses.

BANKRUPTCY — ACT OF BANKRUPTCY. — A creditor obtained judgment and satisfaction against an insolvent debtor, judgment going by default. *Held*, that the debtor had committed an act of bankruptcy by "suffering or permitting a preference through legal proceedings." *In re Reichman*, 91 Fed. Rep. 624 (Dist. Ct. Mo.).

Section 3 of the Bankruptcy Act of 1898 provides that it shall be an act of bankruptcy to "suffer or permit" a preference through legal proceedings. The corresponding section, § 39, of the Act of 1867 was identical; but section 35 of the same act provided that this preference must be "procured by him." Much confusion resulted. The lower courts held that the mere fact of judgment suffered was sufficient under section 39. *Buchanan* v. *Smith*, 8 Blatch. 153. But the Supreme Court by construing the whole statute held that the bankrupt must be active. *Wilson* v. *City Bank*, 17 Wall. 473. Inasmuch as the provision of section 35 of the Act of 1867 is not included in the Act of 1898, the way is clear to distinguish the latter case and to follow the former. The words may then be applied in their ordinary signification. In the principal case the debtor might have prevented judgment by filing his petition in bankruptcy. Accordingly, it is correctly held that he "suffered or permitted" the preference. *In re Gallinger*, 1 Saw. 224; *In re Sutherland*, Deady, 344.

BANKRUPTCY — PROPERTY VESTING IN THE TRUSTEE. — *Held*, that the right of action for damages for a malicious prosecution suffered by the bankrupt does not pass to his trustee in bankruptcy. *In re Haensell*, 91 Fed. Rep. 355 (Dist. Ct. Cal.).

Section 70 of the Bankruptcy Act of 1898 provides in general terms that rights of action of the bankrupt shall pass to the trustee. The law follows in this respect section 14 of the Bankruptcy Act of 1867. Under that provision it was always held that rights of action for personal torts did not vest in the trustee. *Noonan* v. *Orton*, 34 Wis. 259; *Dillard* v. *Collins*, 25 Grat. 343. The decisions under the English Bankruptcy Laws are to the same effect. *Howard* v. *Crowther*, 8 M. & W. 601; *Wetherell* v. *Julius*, 10 C. B. 267. Such rights of action although within the letter are not within the spirit of bankruptcy statutes. The sole object of these laws is to seize and distribute the estate of the bankrupt. Then, the one test to determine whether a right of action passes should be whether the injury in question directly diminished the estate of the bankrupt. Torts to property do so diminish the estate; torts to the person do not. *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Rogers* v. *Spence*, 13 M. & W. 580. In the principal case the tort is clearly personal; and the decision therefore unexceptionable.

BILLS AND NOTES. — INTERLINEATION — PRESUMPTIONS. — An interlineation on the face of a note appeared to have been made with the same ink, in the same handwriting, and at the same time as the note. *Held*, that the presumption is that the alterations were made before delivery. *Muldaner* v. *Smith*, 78 N. W. Rep. 140 (Wis.).

In accord with the reasoning of the principal case it has been held that any alteration is *prima facie* presumed to have been made before delivery. *Franklin* v. *Baker*, 48 Ohio St. 296; *Wilson* v. *Hayes*, 40 Minn. 531. Other cases hold that any alteration, whatever its character, is presumed to have been made after delivery and that this presumption can be rebutted only by extrinsic evidence. *Knight* v. *Clement*, 8 A. & E. 215; *Citizens' Nat. Bank of Baltimore* v. *Williams*, 174 Pa. St. 66. It seems a simpler and a better view to say there is no presumption either way. *Hagan* v. *Merchants & Bankers' Ins. Co.*, 81 Iowa, 321. The pleadings will then determine on whom rests the burden of explaining the alteration. If the plea is *non assumpsit* the jury must be satisfied from the appearance of the note, or from other evidence offered by the plaintiff, that the alteration was made before delivery. If, however, the defendant admits the execution but relies on an alteration made after delivery he must establish that it was so made.

CONSTITUTIONAL LAW. — EMINENT DOMAIN. — ADDITIONAL SERVITUDES. — *Held*, that the erection of electric light poles on a country road, the fee of which is in the abutter, is not an additional servitude where the poles are erected for the purpose of lighting the highway. *Palmer* v. *Larchmont Electric Co.*, 52 N. E. Rep. 1092 (N. Y.).

Held, that the placing of telephone poles on a highway the fee of which is owned by the abutter imposes an additional servitude for which compensation must be made. *Nicoll* v. *New York & N. J. Tel. Co.*, 42 Atl. Rep. 583 (N. J., C. A.).

The distinction, which the former of these cases admits to exist, between the legitimate uses of a country road and of a city street is becoming generally recognized. If it be accepted, great difficulty will be found in its application, — in drawing the line between rural and urban districts. To adopt the incorporation of the town or city as the criterion is not in all respects satisfactory, and any other test is too vague to be acceptable. However, it is admitted that even country highways are subject to the easement of passage; and everything which renders the passage safer or more convenient may be included therein. The erection of poles for purposes of lighting was therefore correctly held to fall within the narrowest definition of a highway. It does not appear whether the poles were to be used for furnishing electricity to private persons. Such fact might be thought to make a difference. *Cf. Bloomfield, &c. Gas Light Co.* v. *Calkins*, 62 N. Y. 386.

The second of the two principal cases follows the great weight of authority in holding telephone poles to impose an additional servitude. Croswell, electricity, §§ 112, 116. But the contrary view has received influential support. *Pierce* v. *Drew*, 136 Mass. 75. The report does not state whether the highway in question was regarded as rural or urban, if that fact be deemed material.

CONTRACTS. — ACCORD AND SATISFACTION. — *Held*, that where a debtor was insolvent, the receipt of part of the sum due without delay or litigation was good consideration for a release of the balance. *Shelton* v. *Jackson*, 49 S. W. Rep. 415 (Tex., Civ. App.).

The departure in this case from the well known rule, that payment of part of a debt does not discharge the whole, rests on an arbitrary distinction. The consideration which the court finds for the release in the avoidance of delay and litigation exists in every case where a creditor compromises with a reluctant debtor. The decision is but a fresh illustration of the inveterate hostility of courts, generally, to the technical rule. *Juffray* v. *Davis*, 124 N. Y. 164; *Smith* v. *Ballou*, 1 R. I. 496. In Minnesota the distinction taken in the principal case as to insolvency has been carried to an extreme limit and it has been held that partial payment discharged the debtor where he was thought to be insolvent though it afterwards appeared that he was not. *Rice* v. *London, etc. Mortgage Co.*, 72 N. W. Rep. 826 (Minn.). The multiplication of such exceptions as these leaves the law in a state of some confusion, but it has the practical advantage of considerably lessening the hardship which would follow a rigid observance of the rule. See 12 HAR. LAW REV. 515, 521.

CONTRACTS. — AUCTION. — At an auction which had been advertised as "unreserved," the plaintiff bid one dollar more than the previous bidder. *Held*, that the auctioneer may refuse the bid since it might not be to the seller's advantage to accept such a slight advance. *Taylor* v. *Harsett*, 55 N. Y. Supp. 988 (Sup. Ct., App. Term).

There is a *dictum* in the case to the effect that the auctioneer is to be considered as the offeror, but the weight of authority is *contra* to this position. *Harrod* v. *Nickerson*, L. R. 8 Q. B. 286; *Spencer* v. *Harding*, L. R. 5 C. P. 561. Granting its soundness the result reached by the court does not follow, for the offer of the highest bid then completed a unilateral contract, rescission of which by one party was impossible. Though the decision is untenable on the grounds assigned, the result is in accord with what may be regarded as the proper view, namely, that the making of the bid is the offer, and that it is accepted and made a binding unilateral contract by the fall of the hammer. Until that time, therefore, it is not binding on either party, and may be withdrawn by the bidder, *Payne* v. *Cave*, 3 T. R. 148; or rejected by the auctioneer, *Mainprice* v. *Westley*, 6 B. & S. 420.

CONTRACTS. — MORAL CONSIDERATION. — The plaintiff by mistake repaired the defendant's house, and the latter, when apprised thereof, promised to pay him. *Held*, that the promise is binding. *Drake* v. *Bell*, 55 N. Y. Supp. 945 (Sup. Ct., Sp. Term.).

A legatee at the request of the testator promised the latter that he would pay the plaintiff $1500. *Held*, that the promise is binding. *Lawrence* v. *Oglesby*, 52 N. E. Rep. 945 (Ill.).

These cases represent two phases of the theory of moral consideration which have received judicial recognition in this country. It has been held that a moral obligation is a good consideration. *Edwards* v. *Nelson*, 51 Mich, 121; *Holden* v. *Banes*, 140 Pa. St. 63. Other courts have taken the view that a moral obligation is not a good consideration except when founded on value previously received from the promisee. *Goulding* v. *Davidson*, 26 N. Y. 604; *Boothe* v. *Fitzpatrick*, 36 Vt. 681. Neither of these views is consistent with the weight of authority. *Hawkes* v. *Saunders*, Cowp. 290, on

which both of the principal cases are based, was in effect overruled by *Eastwood* v. *Kenyon*, 11 A. & E. 438. The latter case is followed in most of the States and the idea that any past or moral obligation can be a sufficient consideration to support a promise has been generally repudiated. *Mills* v. *Wyman*, 20 Mass. 207; *Freeman* v. *Smalley*, 38 N. J. Law, 383.

CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO SPACE. — The defendant covenanted that for twelve months after leaving the employ of the plaintiff he would not engage in the business of a hay or straw merchant within the United Kingdom. *Held*, that the covenant is not void as in restraint of trade, since the restriction is not in excess of what is reasonably necessary for the plaintiff's protection. *Underwood* v. *Barker*, [1899] 1 Ch. D. 300.

The above decision follows the now settled English law. *Nordenfelt* v. *Maxim Nordenfelt, etc., Co.*, [1894] App. Cas. 565; see 8 HAR. LAW REV. 355, 359. In a majority of the jurisdictions in this country the test applied in the principal case has been adopted. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Fowle* v. *Park*, 131 U. S. 88. However, in certain States the courts consider it against public policy to enforce contracts which will drive a man out of his own State in order to carry on any particular trade. *Lange* v. *Werk*, 2 Ohio, 520; *Wright* v. *Ryder*, 36 Cal. 342. As the question is purely one of public policy, the English rule appears more satisfactory. The injury to the public caused by such a personal restriction must be very slight, and therefore the importance of holding parties to contracts entered into *bona fide* seems a prevailing consideration.

CORPORATIONS — MALICIOUS PROSECUTION. — *Held*, that a corporation may be held liable in an action for malicious prosecution. *Comford* v. *Carlton Bank*, [1899] 1 Q. B. D. 392.

The great weight of authority is in accord with this case. *Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287; *Goodspeed* v. *The East Hadden Bank*, 22 Conn. 530; *Reed* v. *Home Savings Bank*, 130 Mass. 443. It was formerly thought that a corporation could not entertain malice, because as Lord Bramwell said, it had no mind. *Abrath* v. *North Eastern Ry. Co.*, 11 App. Cas. 247, 250–51. But a corporation has sufficient legal capacity to make a contract, or plan a railroad. If it is to obtain benefits by means of this capacity, it should also incur liabilities. Of course, malice on the part of an agent, merely, is insufficient. *Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S. 101. It must be authorized or sanctioned by the corporation, in such a manner as would create liability in an individual principal. *Denver, etc. Ry.* v. *Harris*, 122 U. S. 597. That done, there seems to be no reason, inherent in the nature of a corporation, which should relieve it from liability for malicious prosecution.

CORPORATIONS — MUNICIPAL CORPORATIONS — LIABILITY FOR SERVANTS' TORTS. — *Held*, that the duty imposed by statute of New York City of removing dirt from the streets and ashes and garbage from abutting residences is a quasi-private duty, and the city is liable for the torts of its servants while performing it. *Quill* v. *Mayor of New York*, 55 N. Y. Supp. 889 (Sup. Ct., App. Div., Second Dept.).

The case refuses to follow *Davidson* v. *New York*, 54 N. Y. Supp. 51. It is also *contra* to *Love* v. *City of Atlanta*, 95 Ga. 129. These cases proceed on the ground, that, as the municipality performs such duties for the preservation of the public health, it is exercising a police power delegated to it by the State, and is therefore acting in a govermental capacity. The principal case regards the duty as essentially a private one, resting originally on the individual property owner, and assumed by the municipality merely for the convenience and advantage of its citizens. The latter is certainly the more desirable, and seems also the better view. It is more consistent with the historical development of the assumption of such duties by municipalities, and the result is in accord with the general tendency, shown by recent cases, to broaden the liability of public corporations for the tortious acts of their agents. Goodnow, Municipal Home-Rule, 167–183. For a close case in which the opposite result was reached, see 12 HARV. LAW REV. 217.

CRIMINAL LAW — BIGAMY — DEFENCES — The defendant was indicted for bigamy under the usual statute. *Held*, that the fact that he was fraudulently induced to believe that a divorce from his first wife had been duly obtained is no defence. *Russell* v. *State*, 49 S. W. Rep. 821 (Ark.). See NOTES.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — In a trial for murder, *held*, that when evidence of insanity is introduced by the accused, the burden of proving his sanity is on the prosecution. *Brown* v. *State*, 25 So. Rep. 63 (Fla.).

All authorities agree that the prosecution can rest on a presumption of sanity till evidence to the contrary is offered. There is, however, considerable conflict as to

where the burden of proof lies after the introduction of such evidence In the majority of states the accused must establish his insanity. *State* v. *Lawrence*, 57 Me. 574; *Parsons* v. *State*, 81 Ala. 577. The principal case, however, takes the better view. *People* v. *Garbutt*, 17 Mich. 9; *Davis* v. *United States*, 160 U. S. 469. See 11 HAR. LAW REV. 62.

DAMAGES — LIQUIDATED DAMAGES — PENALTIES. — A manager contracted with actors for their services, stipulating that they should pay "a penalty" of $500 for a breach of the engagement or of any of its conditions. The engagement was broken. *Held*, that the manager is entitled to recover the sum named as liquidated damages. *Pastor* v. *Solomon*, 55 N. Y. Supp. 956. (Sup. Ct., Appeal Term.)

The court apparently rests its decision on the ground that the stipulated sum was not disproportionate to the breach complained of. The important point that the penalty was also attached to the breach of any one of several subsidiary conditions was dismissed with the remark that the court cannot say that with respect to them, "the amount in question transcends the permissible limit of liquidated damages." But it seems that this very provision should have turned the decision the other way. If a stipulated sum violates the principle of compensation as to any of the conditions to which it is applicable, it should be treated as a penalty. *Kemble* v. *Farren*, 6 Bing. 141. And if the court is in doubt as to its nature it should hold it a penalty. *Hoag* v. *McGinnis*, 22 Wend. 163. Moreover, when the contract does not refer to the fixed sum except as a penalty, courts are extremely reluctant to allow it to be recovered as liquidated damages even though it is not otherwise objectionable. *Taylor* v. *Sandiford*, 7 Wheat. 13; 1 Sedg., Dam. 8th ed., § 410.

EVIDENCE — CONFESSIONS — QUESTION FOR COURT. — *Held*, that the question whether a confession was voluntary or not may be left to the jury with proper instructions. *Commonwealth* v. *Shew*, 42 Atl. Rep. 377 (Pa.).

The principal case represents a not uncommon practice among presiding judges of leaving the confession and the evidence bearing on the manner in which it was obtained to the jury, with directions to disregard the confession if they find it was involuntary. The practice, however, is indefensible on principle. *People* v. *Barker*, 60 Mich. 277; *Commonwealth* v. *Smith*, 119 Mass. 305. There are properly two questions in such cases: first, the admissibility or competency of the confession, and, second, the weight to be given to it. The former is always a question for the court, and the latter for the jury. *Commonwealth* v. *Culver*, 126 Mass. 464. Accordingly, the jury may give no weight to the confession when admitted if they believe it was involuntary; but before admitting it to them the judge should determine that the confession was voluntarily made, for its admissibility depends on that. *Fife* v. *Commonwealth*, 29 Pa. St. 429; *Rufer* v. *Egner*, 25 Ohio St. 464.

EVIDENCE — IMPEACHMENT OF WITNESS. — A witness summoned by the defendant testified on an immaterial point. He was then called by the plaintiff as witness for him. *Held*, that the defendant may impeach the witness. *Fall Brook Coal Co.* v. *Hewson*, 52 N. E. Rep. 1095 (N. Y.).

The common law rule, that no one can impeach his own witness, has been largely altered by statute, but still remains in force in New York. *Coulter* v. *American, etc. Express Co.*, 56 N. Y. 585. In accord with the early English decisions the principal case holds that no one becomes a witness within its meaning until he has given testimony material to the issue. *Creevy* v. *Carr*, 7 C. & P. 64; *Wood* v. *Mackinnon*, 2 Moo. & R. 273. The rule itself rests on the theory that the party who summons a witness in effect guarantees his veracity, and should therefore be estopped from proving him untrustworthy. *Selover* v. *Bryant*, 54 Minn. 434; *Pollock* v. *Pollock*, 71 N. Y. 137. But at best this reasoning is artificial and unsatisfactory. 11 Am. Law Rev. 261. Accordingly the principal case may well be supported in limiting the application of the general rule, and allowing the party who summons a witness to impeach such witness when he has not contributed to the support of his case.

EVIDENCE — MALICIOUS PROSECUTION — QUESTION FOR COURT. — In an action for malicious prosecution, *held*, that the question, whether or not the established facts of the case constituted probable cause, was properly submitted to the jury. *Owens* v. *New Rochelle, etc. Co.*, 55 N. Y. Supp. 913 (Sup. Ct., App. Div., Second Dept.)

In determining the question of probable cause in an action for malicious prosecution, it is the almost universal rule that the function of the jury is merely to find from the evidence what are the ultimate facts, while the duty of applying the law to such facts is exclusively for the court. *Panton* v. *Williams*, 2 Q. B. 169; *Smith* v. *Munch*, 65 Minn. 256; 2 Thompson, Trials, § 1618. The explanation of this doctrine, which is a departure from the usual mode of distinguishing between the functions of the court and jury, is chiefly historical. Thayer, Prelim. Treat. Ev. 221–231. In actual practice

the rule has a beneficial effect. It avoids the danger that the jury may indulge an unjust prejudice, which it is very apt to entertain against a defendant in this action. The holding in the principal case, then, can hardly be justified. It probably resulted from a misconception of the law as laid down in former New York decisions. *Cf. Beeson* v. *Southard*, 10 N. Y. 236; *Heyne* v. *Blair*, 62 N. Y. 19.

EVIDENCE — PAROL EVIDENCE RULE.—In an action on a bond of indemnity the defendant wished to show that it had been given upon an unfulfilled promise by the plaintiff to notify the defendant promptly of any default by the principal debtor. *Held*, that the evidence is inadmissible. *Mason & Hamlin Co.* v. *Gage*, 78 N. W. Rep. 130 (Mich.).

The case is undoubtedly correct. It is a general rule that parolæ testimony cannot be received to add to or subtract from the terms of a written contract. *Angell* v. *Duke*, 32 L. T. Rep. N. S. 320. This is founded on a presumption that the parties have included all the terms and conditions in the writing. The case, therefore, is governed rather by a rule of the substantive law of contracts than by a rule of evidence. It is permissible, however, for the obligor to show that there was a condition precedent to the contract taking effect. This is not adding to the agreement but showing that in fact there was no contract. *Pym* v. *Campbell*, 6 E. & B. 370; *Earle* v. *Rice*, 111 Mass. 17. In the present case, however, the agreement was binding when made, and the defendant wished to show that later, owing to a condition subsequent not contained in the writing, it had become void. To allow this would certainly be to vary the terms of the contract. *Beard* v. *Boylan*, 59 Conn. 181; *Aultman & Taylor Co.* v. *Gorham*, 87 Mich. 233.

INSURANCE — WARRANTY — CONSIDERATION. — The insured in a policy of fire insurance, agreed to keep a complete record of his business and to deposit his books in a fireproof safe at night. *Held*, that the agreement was without consideration and void, and a failure to perform it did not bar a right of action upon the policy. *Mechanics' & Traders' Ins. Co.* v. *Floyd*, 49 S. W. Rep. 543 (Ky.).

The contract was unilateral, and the payment of the premium was the whole consideration for the assumption of the risk by the insurer. After that nothing remained to be done by the insured which required consideration. *Worsley* v. *Wood*, 6 T. R. 710. The so-called warranty or covenant by the insured was in the nature of a condition precedent in effect, but subsequent in form, and should have been literally performed by the insured to entitle him to recover. *Leroy* v. *Market Fire Ins. Co.*, 39 N. Y. 90. Unlike a warranty made by the vendor of a chattel it was not a collateral agreement. A failure to observe this distinction has led the court in the principal case into error. Moreover, the parties here expressly stipulated that the insurer should not be liable upon the policy if the insured did not perform the agreement — a point which the court apparently overlooked. The case seems unsound in any point of view.

INTERPRETATION OF STATUTES — INTERNAL REVENUE — REBATE OF TAX. — Sec. 61, c. 349 of the Acts of Congress for 1894 provides that any manufacturer finding it necessary to use alcohol in the arts, etc., "may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector . . . that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive" repayment of such tax. No regulations were made by the Secretary. The plaintiff used alcohol in the arts; tendered to the collector evidence of such use, together with stamps showing payment of the tax thereon; and requested the collector to visit the factory and satisfy himself that the alcohol had been so used. *Held*, that the plaintiff is not entitled to repayment of the tax, since the making of the regulation is a condition precedent to the existence of any right of rebate. *Dunlap* v. *United States*, 19 Sup. Ct. Rep. 319. Brown, White, Peckham, and McKenna, JJ., dissenting.

The decision is an interesting and important one to commercial interests. It is a little difficult to see why the wording of the statute required the construction put upon it by the majority of the court, especially as the result is to destroy all effect of the act, since the Secretary has found it impracticable to make the necessary regulations.

NATIONAL BANKS — SECURED CREDITORS. — *Held*, that under the existing National Banking Act secured creditors of an insolvent national bank are entitled to dividends *pro rata* to their original claims without regard to the securities held. *Merrill* v. *Nat. Bank of Jacksonville*, 19 Sup. Ct. Rep. 360. See NOTES.

PARTNERSHIP — PARTNERSHIP PROPERTY — EXEMPTIONS. — The plaintiff, an individual creditor of the defendant, recovered judgment against him and levy was made on the debtor's undivided interest in certain partnership property consisting of four mules. The partnership was dissolved, and two of the mules surrendered to the de-

fendant. In an action to enforce a lien on them, *held*, that the defendant is protected by a statute providing that two work-beasts of an individual are exempt from execution. *Southern Jellico Coal Co.* v. *Smith*, 49 S. W. Rep. (Ky.).

It is held in Kentucky that a partner cannot claim exemptions out of partnership property against a partnership creditor. *Green* v. *Taylor*, 98 Ky. 330. This case presents the question of whether a partner can claim exemptions out of partnership property as against his individual creditor. When such a creditor has an execution levied on the debtor's interest in the firm assets, he secures the right to go into equity and force a settlement of the partnership. *Nixon* v. *Nash*, 12 Ohio, 647. His execution creates a lien on the property, subject to its liability as partnership property. *Pierce* v. *Jackson*, 6 Mass. 242. But the moment the partnership is settled and it is ascertained that some part of the property belongs to the debtor, his right to exemption is fixed and superior to the claim of the execution creditor. Such is the effect of the principal case, and it is doubtless correct. It is interesting to notice that under the peculiar circumstances here presented a like result would have been reached had the courts proceeded on the entity theory.

PATENTS — NOVELTY — EVIDENCE. — In an infringement suit evidence of immediate commercial success was introduced to support the patent. *Held*, that until invention is shown such evidence cannot be considered. *Way* v. *McClarin*, 91 Fed. Rep. 663 (Cir. Ct., Pa.).

The principal question presented is left in doubt by the authorities. Novelty is the primal requisite of invention and immediate commercial recognition has, indeed, a certain probative force on the question of novelty. Until recently the United States Supreme Court spoke of such recognition as "most pregnant evidence of novelty." *Magowan* v. *New York Belting Co.*, 141 U. S. 332. But later decisions of that court have tended toward the narrower view expressed in the principal case. *Duer* v. *Corbin Lock Co.*, 149 U. S. 216. It is clear that the true criterion of invention is intrinsic — the introduction of a new mechanical combination or principle. *Hotchkiss* v. *Greenwood*, 4 McLean, 456. Therefore, articles of commerce are not patentable merely because they are new. *Union Paper Collar Co.* v. *Van Dusen*, 23 Wall. 550. Moreover, commercial success is as apt to be due to extensive advertising and energetic selling as to novelty in invention. For these reasons the decision in the principal case, that such evidence is never to he considered unless the case is one of doubt, seems most politic.

PERSONS — MARRIED WOMEN — ALIENATING HUSBAND'S AFFECTIONS. — *Held*, that a married woman cannot maintain an action against a third person for alienating her husband's affections. *Morgan* v. *Martin*, 42 Atl. Rep. 354 (Me.). See NOTES.

PROPERTY — ADVERSE POSSESSION — TACKING. — *Held*, that a landowner is deprived of his title if the combined periods of occupancy of his disseisor and of the vendee of his disseisor equal twenty years. *Frost* v. *Courtis*, 52 N. E. Rep. 515 (Mass.). See NOTES.

PROPERTY — EASEMENTS — PAROL LICENSE. — The plaintiff had laid a water main across the defendant's lands under a parol license and had maintained it for more than six years. *Held*, that the plaintiff is not entitled to an injunction restraining the defendant from taking up the pipes. *Great Falls Waterworks Co.* v. *Great Northern Ry. Co.*, 54 Pac. Rep. 963 (Mont.). See NOTES.

PROPERTY — PLEDGE — CONVERSION. — The plaintiff deposited certificates of stock with the defendant as security for a debt. On default, the defendant sold the stock without notice to the plaintiff, who brings trover without tender of payment. *Held*, that the plaintiff can recover. *Feige* v. *Burt*, 77 N. W. Rep. 928 (Mich.). See NOTES.

PROPERTY — REVOCATION OF LICENSE — EQUITABLE REMEDY. — The plaintiff partially constructed a logging railroad over the defendant's land under a license, written but not sealed. The defendant having revoked the license, *held*, that equity will not enjoin him from interfering with the plaintiff's work since no incorporeal interest in land can be created without a deed. *Nowlin Lumber Co.* v. *Wilson*, 78 N. W. Rep. 338 Mich.

The authorities on this point are about equally divided, many cases being in accord with both the reasoning and the result reached in the above decision. *Owen* v. *Field*, 94 Mass. 457; *St. Louis Nat. Stock Yards* v. *Wiggin's Ferry Co.*, 112 Ill. 384. An opposing line of cases proceeds upon the principle that the licensor, in equity, should not be allowed to exercise his legal right to revoke, where the licensee has expended money on the land, so that a revocation would work a material fraud upon him. *Clark* v. *Glidden*, 60 Vt 702; *Campbell* v. *Indianapolis, &c. Ry.*, 110 Ind. 490. The latter view avoids the difficulty stated in the principal case, as it does not involve the creation of any interest in land by virtue of the license, and the result thus reached seems preferable on general grounds of justice and equity.

RIGHTS IN A DEAD BODY. — The widow of a decedent was in possession of his body. *Held*, that a Court of Probate improperly awarded the custody to a stranger for the purpose of burial. *O'Donnell* v. *Slack*, 55 Pac. Rep. 906 (Cal. Sup. Ct.).

The result reached is doubtless correct, the right of the family to a decedent's body being recognized everywhere in this country. There is, however, some uncertainty as to the nature of that right. In the principal case the court is inclined to view it as a quasi-property right. *Pierce* v. *Proprietors of, etc. Cemetery*, 10 R. I. 227. It has been suggested that it would be more appropriate to classify it with those rights which rise out of the family relation, such as the right of a husband to the *consortium* of his wife. 5 HAR. LAW REV. 285. This explanation avoids many difficulties which arise in treating this subject as a branch of the law of property and is quite consistent with the results reached in the cases. *Larson* v. *Chase*, 47 Minn. 307. It also finds support in the disposition of the courts to award the disposal of the body of a married person to the husband or wife rather than to the next of kin. *Hackett* v. *Hackett*, 18 R. I. 155. See 10 HAR. LAW REV. 51.

SURETYSHIP — EXTENSION OF TIME — DISCHARGE OF SURETIES. — The obligee of a bond agreed to extend the time of payment for a fixed period, the obligor promising to pay the debt and interest at the expiration of that time and not before. *Held*, that the agreement was invalid for want of consideration and did not discharge the sureties. *Olmstead* v. *Latimer*, 53 N. E. Rep. 5 (N. Y.).

It is difficult to uphold this decision, although it has the support of some cases in other jurisdictions. *Abel* v. *Alexander*, 45 Ind. 523; *Hale* v. *Forbis*, 3 Mont. 395. Even if one adopts the theory that to make the promise of the obligee binding the promise of the obligor must be to do something which will work a legal detriment to the latter, there is a good consideration here. The giving up by the obligor of the right to pay his debt at any time before the expiration of the period of extension is the surrender of a valuable legal right, and a sufficient consideration for the undertaking of the obligee. *Ostrander* v. *Everest*, 44 Minn. 419. Further, by such agreement the debtor postpones the running of the statute of limitations against his obligation, and this in itself is enough to support the creditor's promise. See *Garrett* v. *Brock*, 27 Ga. 576. The agreement in the principal case, therefore, it seems, was valid and the sureties should have been discharged.

TORTS — DECEIT — REPRESENTATIONS OF VALUE. — The defendants induced the plaintiff to purchase an interest in a patent on harness buckles by false statements in regard to the cost of manufacturing the buckles. *Held*, that an action for deceit lies. *Braley* v. *Powers*, 42 Atl. Rep. 362 (Me.).

The better view seems to be that false statements by the vendor as to the cost of an article may be actionable. *Fairchild* v. *McMahon*, 139 N. Y. 290; *Weeks* v. *Burton*, 7 Vt. 67. Some courts, however, hold that such statements are to be regarded as mere "seller's talk," and will not support an action unless the vendor is in a position to have special knowledge of the subject. *Bourn* v. *Davis*, 76 Me. 223; *Mooney* v. *Miller*, 102 Mass. 217; *Stover* v. *Wood*, 26 N. J. Eq. 417. According to either view the principal case is correctly decided. Statements by the patentee as to the cost of manufacturing the article do not properly come under the head of "seller's talk." In such a case the vendor clearly has special knowledge on which the vendee is entitled to rely.

TORTS — INTERFERENCE WITH BUSINESS — CONSPIRACY. — A granite manufacturers' association adopted a resolution forbidding trading in granite except with members of the association. The by-laws imposed a fine for a violation of the rules, and the effect was practically to destroy the plaintiff's business. *Held*, that the members of the association are liable to the plaintiff, although they made no attempt to influence persons outside of the association. *Boutwell* v. *Marr*, 42 Atl. Rep. 607 (Vt.).

The case is unsatisfactory because no authority is cited, but interesting from the fact that the only coercion was that exercised on the members of the association by the fine. In this the court found "unlawful means." It seems clear the English courts would not allow recovery in such a case as this. *Allen* v. *Flood*, [1898] App. Cas. 1; *Huttley* v. *Simmons*, 14 Times L. R. 150; *Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476. There are also American cases *contra*. *Macaulay* v. *Tierney*, 19 R. I. 255; *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223. The principal case is an extreme example of the length to which some American courts go in allowing recovery in these cases. *Barr* v. *Essex Trade Council*, 53 N J. Eq. 101. On the facts as stated, it seems an unjustifiable attempt to furnish a legal remedy for the hardships of competition by combination, and is hardly to be supported either on legal theory or on the ground of public policy.

TRUSTS — GRATUITOUS DECLARATION — REVOCATION. — The deceased had her bank-book made out to her in trust for X. Later she surrendered the book to the bank, and took a new one in trust for Y. Both trusts were gratuitous. *Held*, that the trust in favor of X was revoked, and Y is entitled to take as *cestui que trust*. *Jennings* v. *Hennessey*, 55 N. Y. Supp. 833 (Sup. Ct., Trial Term, N. Y. Co.).

The facts in the case do not show clearly whether an enforceable trust in favor of X was established. A trust can certainly be created by a gratuitous declaration similar to the one in the present case, and when once created is irrevocable. *Martin* v. *Funk*, 75 N. Y. 134; *Fellow's Appeal*, 93 Pa. St. 470. If, however, the declaration of trust was merely for the purpose of evading some by-law of the bank and no trust was actually intended, equity will not enforce it, and will permit a revocation. *Brabrook* v. *Boston Bank*, 104 Mass. 228; *Markey* v. *Markey*, 73 N. Y. Supp. 925. Extrinsic evidence is admissible in such cases to explain the true character of the transaction. *Cunningham* v. *Davenport*, 147 N. Y. 43. No evidence appears to have been offered in explanation in the present case, however, and, from the meagre facts given, it appears that an irrevocable trust had been established, and that the first *cestui que trust*, X, having the prior equity, should have been allowed to recover.

REVIEWS.

THE JURISDICTION OF FEDERAL COURTS AS LIMITED BY THE CITIZENSHIP AND RESIDENCE OF THE PARTIES. By Howard M. Carter of the Chicago Bar. Boston: Little, Brown & Co. 1899. pp. xxviii, 303.

The plan of making a book on a narrow subject, one which usually forms a chapter or two of a book, instead of a whole book, has much to commend it. A thoroughness and care of treatment is possible, which is hardly attainable in a large field; and the book before us contains certainly the most complete and useful discussion in print on the topic with which it deals. Nevertheless, it is not so good a book as it should be. It seems unduly expanded in the way of quotations for nearly, if not quite, 100 of the 247 pages which constitute the body of the work are made up of such material; yet in spite of this elaboration the real defect is lack of thoroughness. It is not too much to ask of the author of a book covering so small a field, in which, moreover, all the authorities are contained in the reports of the Federal Courts, that his work shall be absolutely exhaustive, not simply in the treatment of principles, but in the citation of cases. Mr. Carter's work does not come up to this standard. Not only are the citations from the Federal Reporter not exhaustive, but important recent decisions of the Supreme Court are omitted. *Barrows S. S. Co.* v. *Kane*, 170 U. S. 100, on the right to sue an alien in any District, *St. Joseph & G. I. R. R. Co* v. *Steele*, 167 U. S. 659, in regard to the citizenship of a corporation chartered by several states, *Mexican Nat. R. R. Co.* v. *Davidson*, 157 U. S. 201, on what is a chose in action within the meaning of the statutes governing the jurisdiction of the United States courts, are each the latest decision on an important point dealt with by this book, yet not one of these cases is cited. On page 169 there is something more than an error of omission. It is stated that the appointment by a foreign corporation in compliance with a statute of an agent authorized to receive service of process is not a waiver of its right to insist on being sued in the State of its incorporation. For this statement a case of half a page in the Federal Reporter is cited. But the contrary has been decided in other Circuits in at least three cases not cited either in that case or by Mr. Carter. *Consolidated Store Service Co.* v. *Lamson Consolidated Store Service Co.*, 41 Fed. Rep. 833; *Gilbert* v. *New Zealand Ins. Co.*, 49 Fed. Rep. 884; *Youmans* v. *Minn. Title Ins. & Trust Co.*, 67 Fed. Rep. 282. It seems very possible that a difference in the wording of different statutes might cause the same judge to make varying decisions as to whether such an appointment operated as a waiver.

S. W.